No. 93-1121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ED PLAUT, *et al.*,

Petitioners,

v.

SPENDTHRIFT FARM, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78aa-1, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation-of-powers doctrine or the Fifth Amendment Due Process Clause of the United States Constitution.

LIST OF PARTIES

In addition to petitioner named in the caption, Nancy McHardy Plaut and John Grady were appellants in the court below and are petitioners here. The United States intervened pursuant to 28 U.S.C. § 2403(a). In addition to respondent named in the caption, the following parties were appellees in the court below and are respondents here: Kemper Securities, Inc. (formerly Bateman Eichler, Hill Richards, Inc.), Francis M. Wheat, Gibson, Dunn & Crutcher, Deloitte & Touche (formerly Deloitte, Haskins & Sells), Norman D. Owens, and the American International Bloodstock Agency, Inc. Respondents incorporate the Rule 29.1 disclosures concerning parent and subsidiary corporations contained in their respective responses to the certiorari petition.

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BRIEF FOR RESPONDENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves § 27A of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78aa-1 (Supp. IV 1992), which is reproduced in full in the Appendix to this Brief. It also involves § 10(b) of the 1934 Act, 15 U.S.C. § 78j(b)(1988); Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1994); Articles I and III of the Constitution of the United States; and the Due Process Clause of the Fifth Amendment to the Constitution, which are reprinted in pertinent part in the Appendix.

STATEMENT OF THE CASE

This case involves the constitutionality of a congressional enactment that requires the reopening of final judgments of Article III courts in order to reverse the effect of two decisions of this Court on cases that were pending on the date of those decisions.

A. Proceedings Prior To The *Lampf* And *Beam* Decisions

Petitioners commenced this action in the United States District Court for the Eastern District of Kentucky on November 20, 1987, alleging that respondents committed violations of § 10(b) and Rule 10b-5 in connection with purchases by petitioners in 1983 and 1984 of shares of stock of respondent Spendthrift Farm, Inc. In January and February, 1988, respondents filed motions to dismiss the complaint on the ground, *inter alia*, that it was barred by the three-year statute of limitations borrowed from the Kentucky state securities laws. The district court placed the motions in abeyance pending this Court's decision in

Lampf, Pleva Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773 (1991).[1]

B. The *Lampf* And *Beam* Decisions

On June 20, 1991, this Court rendered its decision in *Lampf*. The Court held that the private right of action that had been implied by courts from § 10(b) is subject to the "1-and-3-year" statute of limitations governing express remedies enacted by the 73rd Congress along with § 10(b) as part of the 1934 Act. After acknowledging that § 10(b) private claims "are of judicial creation," 111 S. Ct. at 2779, and that "we have made no pretense that it was Congress' design to provide the remedy afforded," *id.* at 2780, this Court defined its "awkward task" as that "of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed," *id.* The Court concluded that "[w]e can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related provisions." *Id.* Accordingly, the Court approved the rule that had been adopted by three

[1] While its motion to dismiss was pending, respondent Deloitte & Touche (then Deloitte, Haskins & Sells) filed a supplemental memorandum arguing that the action was time-barred under the uniform federal "1-and-3-year" statute of limitations that had been held to apply to § 10(b) claims by the Third Circuit in *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988). *See* Supp. Mem. In Support Of Defendant Deloitte, Haskins & Sells' Motion To Dismiss (Aug. 2, 1988). Deloitte & Touche argued that "*Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), which in turn builds on *Wilson v. Garcia*, 471 U.S. 261 (1985), and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), raises considerable doubt regarding the courts' practice of applying a state statute of limitations to federal securities claims under Section 10(b)." *Id.* at 3.

federal courts of appeals[2] and rejected inconsistent lower court decisions that had applied state-law limitation periods to § 10(b) claims. Because the *Lampf* plaintiffs had filed their complaint more than three years after the defendants' alleged misrepresentations, the Court held that their claims were untimely. *Id.* at 2782.

On the same day it decided *Lampf*, this Court also decided *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991). *Beam* held that similarly situated litigants must be treated the same and that, therefore, a rule of law articulated by this Court and applied to the parties before the Court is equally applicable in all pending cases raising the same issue. Thus, under *Beam*, the Court's construction of § 10(b) in *Lampf* governed all cases pending at the time, including the case at bar. This Court's subsequent issuance of its mandates in *Lampf* and *Beam* effectively terminated the substantive legal rights of the *Lampf* plaintiffs and all other plaintiffs similarly situated, and those mandates did so with the same decisiveness and finality that have been the hallmarks of the Article III judicial function for over two centuries.

C. Congressional Reaction To *Lampf* And *Beam*, And The District Court's Entry Of Final Judgment In This Case

In response to the *Lampf* and *Beam* decisions, two proposals were introduced in Congress in the summer of 1991 to amend the 1934 Act and replace the 1-and-3-year *Lampf* statute of limitations with new, longer limitation periods for § 10(b) actions. Senator Bryan introduced S. 1533, which would have established a 2-and-5-year limitation period for "any private right of action" under the

[2] *See Ceres Partners* v. *GEL Assocs.*, 918 F.2d 349 (2d Cir. 1990); *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991); *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537.

1934 Act. *See* S. 1533, 102d Cong., 1st Sess. (1991); 137 Cong. Rec. S10,675-76, S10,691-92 (daily ed. July 23, 1991) (statement of Sen. Bryan). In August, Representative Markey introduced H.R. 3185, which proposed a 3-and-5-year limitation period. *See* H.R. 3185, 102d Cong., 1st Sess. (1991); 137 Cong. Rec. E2,843 (daily ed. Aug. 2, 1991) (statement of Rep. Markey). Both S. 1533 and H.R. 3185 provided for application of a longer limitation period to cases pending when *Lampf* and *Beam* were decided.

On August 13, 1991, the district court in this case, following the requirements of *Lampf* and *Beam*, held that petitioners' § 10(b) claims were time-barred. The court dismissed the complaint with prejudice and entered final judgment for respondents. Joint App. 6. Although S. 1533 and H.R. 3185 were pending in Congress, petitioners did not file post-judgment motions to alter, amend or modify the judgment dismissing their case, nor did they file a notice of appeal. The thirty-day period for filing a notice of appeal expired on September 12, 1991.[3]

H.R. 3185 did not emerge from committee. The Senate Committee on Banking, Housing and Urban Affairs, however, added S. 1533 as an amendment to a major pending bill, S. 543, that addressed totally unrelated subject

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[3] Petitioners and the United States assert that an appeal would have been sanctionable. *See, e.g.*, Pet. Br. at 4; U.S. Br. at 3 n.1. *Lampf*, however, was a five-to-four decision, and *Beam* was decided by a divided Court with five separate opinions. The Commonwealth of Virginia challenged the *Beam* holding all the way to this Court without incurring sanctions. *Harper* v. *Virginia Dept. of Taxation*, 113 S. Ct. 2510 (1993). There is no available information to indicate that any § 10(b) plaintiff has been sanctioned for challenging the retroactive application of *Lampf*. *See generally* A. Sabino, *A Statutory Beacon or a Relighted* Lampf? *The Constitutional Crisis of the New Limitary Period For Federal Securities Law Actions*, 28 Tulsa L. Rev. 23, 61-65 (1992) (arguing that *Lampf* should not be applied retroactively).

matter -- the refunding and reform of the Federal Deposit Insurance Corporation ("FDIC"). *See* S. Rep. No. 167, 102d Cong., 1st Sess. 205-06, 522-23 (1991). In the subsequent floor debate on S. 543, Senator Bryan's proposal -- incorporated as § 1126 of the FDIC bill -- encountered substantial resistance. For example, Senator Domenici and others argued that the Senate should not adopt § 1126 except as a part of a broader litigation reform package addressing and controlling frivolous and abusive securities litigation. *See* 137 Cong. Rec. S16,469-76, S16,504-07, S16,509-S16,609 (daily ed. Nov. 13, 1991); *see also* 137 Cong. Rec. S17,001, S17,033-34, S17,036-37 (daily ed. Nov. 19, 1991).

The supporters of the 2-and-5-year limitation period were unable to muster sufficient support to preserve its inclusion in S. 543. However, the Senate changed § 1126 on November 21, 1991, substituting language that, with slight modification, would eventually become § 27A. *See* 137 Cong. Rec. S17,315 (daily ed. Nov. 21, 1991). In this version, the effort to legislate a new, longer statute of limitations for § 10(b) claims was abandoned, but § 1126 nonetheless required "the *Lampf* decision to be set aside so there would, in fact, be a legal reachback to cover cases" pending at the time that *Lampf* was decided. *Id.* at. S17,306 (statement of Sen. Riegle).

The House passed its version of the FDIC reform bill, H.R. 3768, on the same day. *See* H.R. 3768, 102d Cong., 1st Sess. (1991). The House bill did not contain a provision relating to § 10(b).

During the subsequent debate on S. 543 and H.R. 3768, the provision that ultimately became § 27A was urged because *Lampf* and *Beam* had "resulted in dismissal of many currently pending private Rule 10b-5 actions against Charles Keating, Michael Milken and other figures," 137 Cong. Rec. H11,811 (daily ed. Nov. 26, 1991) (statement of Rep. Dingell), and because "fraud claims, including those against Milken, Keating and Fred Carr, are

threatened with pending dismissal motions solely as a result of *Lampf*," *id.* at H11,812 (statement of Rep. Markey). Section 27A's supporters perceived the *Lampf* decision to be "ill-considered," *id.*, and a "mistake," 137 Cong. Rec. at S18,624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan).

Refunding the nearly insolvent FDIC was an urgent necessity on November 26, 1991, when the House and Senate Conference Committee convened to reconcile the two bills. As a result, the Conference Committee met throughout the night, agreeing to a bill just before dawn on November 27, 1991. *See* 137 Cong. Rec. H11,760-813 (daily ed. Nov. 26, 1991); 137 Cong. Rec. at S18,617-26 (daily ed. Nov. 27, 1991); L. Gruson, *D'Amato Wins in Effort for Charities*, N.Y. Times, Nov. 28, 1991, at B1. This bill was enacted as the 157-page FDIC Improvement Act of 1991 ("FDICIA"), *see* Pub. L. No. 102-242, 105 Stat. 2236 (1991), and included a provision, § 476, that was ultimately codified as § 27A of the 1934 Act. FDICIA related almost exclusively to the FDIC. The President signed FDICIA into law on December 19, 1991.

D. Provisions Of § 27A

Section 27A has two parts. Part (a) applies to "**pending causes of action.**" It states that for pending § 10(b) cases that were also pending on June 19, 1991, the statute of limitations shall be the "period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991."

Part (b) applies only to "**dismissed causes of action.**" It requires that a § 10(b) action pending on June 19, 1991 "shall be reinstated" if it was "dismissed as time barred subsequent to June 19, 1991," and "would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991."

Section 27A was unmistakably intended by its proponents to "overturn[ ]" what certain Members of Congress considered to be "the most egregious part of the [*Lampf*] decision," 137 Cong. Rec. at S18,623 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan), by directing courts, in the § 10(b) cases that were pending on June 19, 1991, to set aside the rule of decision required by *Lampf* and *Beam* and to apply the rule of decision explicitly rejected in *Lampf*, even if it meant reopening dismissed cases. Indeed, even if the legislative history were devoid of these statements as to the purpose of § 27A, the text of that provision would, and does, speak for itself: Because Congress could not reach a majoritarian consensus to change the statute of limitations applicable to § 10(b) cases filed after June 19, 1991, Congress confined its intervention to keeping alive or resuscitating those § 10(b) cases that had been filed on or before June 19. Congress even intended for courts to apply "interpretative principles such as retroactivity and equitable tolling," *id.* at S18,624, that this Court explicitly rejected in *Lampf* and *Beam*.

Section 27A has no effect on the statute of limitations for § 10(b) cases commenced after § 27A's enactment, or even for cases that were filed after the *Lampf* decision but before § 27A was enacted into law. The current statute of limitations for § 10(b) cases is just as *Lampf* decided; it was left unchanged by § 27A: "[W]e resolved [that] issue by *not* extending the statute of limitations on 10(b) type of litigation." 137 Cong. Rec. S17,309 (daily ed. Nov. 21, 1991) (statement of Sen. Domenici) (emphasis added).

E. Proceedings Below After Enactment Of § 27A

On February 11, 1992, petitioners filed a motion asking the district court to reinstate their § 10(b) claims pursuant to § 27A(b). On April 13, 1992, the district court denied petitioners' motion, holding that § 27A(b) contravenes both the constitutional separation of powers and the Due Process Clause of the Fifth Amendment. Pet. App. 33a-39a.

On August 3, 1993, the Sixth Circuit affirmed the district court's denial of petitioners' motion to reinstate, holding that § 27A(b) violates the separation-of-powers doctrine. Pet. App. 5a-27a.[4] After analyzing the principles reflected in decisions of this Court dating back to *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), the Sixth Circuit concluded that "the Supreme Court has from the beginning maintained the rule that Congress may not retroactively disturb final judgments of the Federal courts." Pet. App. 13a. The court stated that "[w]e search in vain for an instance where the courts have permitted Congress retroactively to disturb final judgments rendered in cases between private litigants." *Id.* To hold that Congress enjoys such a power, the court concluded, would clash with traditional understanding of "the fundamental natures of the legislative and judicial powers," *id.* at 14a, and "render the whole function of the judiciary futile," *id.* at 25a.[5]

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[4] The court below did not reach the due process question because it determined that "the asserted ability of Congress to disturb rendered final judgments does not hinge on the nature of the judgment and its property value to the prevailing litigant." Pet. App. 14a n.12.

[5] The Tenth Circuit has also declared § 27A(b) unconstitutional, holding that it violates both the separation of powers and the Fifth Amendment Due Process Clause. *See Johnston* v. *CIGNA Corp.*, 14 F.3d 486 (10th Cir. 1993), *pet. for cert. pending* (No. 93-1723). The Second Circuit questioned the constitutionality of § 27A(b) as applied to final judgments, but found it unnecessary to resolve the issue on the facts before it. *See Axel Johnson, Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 83-84 (2d Cir. 1993). Only one court of appeals, the Fifth Circuit, has upheld the constitutionality of § 27A(b) as applied to final judgments. *See Pacific Mut. Life Ins. Co.* v. *First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993), *aff'd by an equally divided court sub nom. Morgan Stanley & Co.* v. *Pacific Mut. Life Ins. Co.*, 114 S. Ct. 1827 (1994).

SUMMARY OF ARGUMENT

Section 27A raises substantial constitutional questions concerning the power of Congress to set aside final judgments of Article III courts and to substitute congressional rules of decision for judicial judgments in closed cases. Those constitutional issues may, however, be avoided by two alternative constructions of § 27A that are entirely consistent with the language of § 27A and the teachings of this Court.

First, § 27A directs that courts render decisions based upon statutes of limitations as they existed in various jurisdictions on June 19, 1991. On June 20, 1991, this Court announced the statute of limitations for § 10(b) cases, and that decision declared not only what the law was on June 20, but what the law was on June 19 as well. The Court did not invent the 1-and-3-year § 10(b) limitation period on June 20; it found that that was the correct limitation period and the one that the 73rd Congress would have imposed in 1934 when § 10(b) was enacted. In short, the Court declared what the law was then and had been, not what it would be from that point forward. Whatever its proponents' intentions, § 27A contains language that requires only that courts apply the law as this Court found it to be. This construction is consistent both with § 27A's literal meaning and this Court's jurisprudence, and would make review of the constitutional issues in this case unnecessary.

Second, § 27A(b) applies by its terms to dismissed cases. It does not, however, by its terms apply to cases in which *final* judgments of dismissal have been entered. If § 27A(b) is construed not to reach completely closed cases, and there is nothing in the language or history of § 27A(b) to suggest otherwise, the constitutional implications of § 27A(b) need not be reached in this case.

If the constitutional dimensions of § 27A must be addressed, the issues it raises are exceedingly serious. The congressional mechanism created by § 27A threatens the

Constitution's defining structural principle. "No political truth" was more central to the Constitution's structure than the division of governmental power among the three Branches. Nothing in the Constitution carries greater weight than the restraints the Framers imposed to prevent one Branch from exercising the central functions of another Branch or revising that other Branch's exercise of its own functions.

The Framers were particularly concerned that, because of its enterprising ambition and extensive powers, the Legislative Branch would threaten the powers of the other Branches. By the same token, the Judicial Branch was perceived as the weakest of the three Branches, and therefore the most in need of protection from encroachment by the factional impulses of Congress.

The Framers accordingly carefully separated judicial and legislative powers, and they knew about, discussed and intentionally denied Congress the power to reverse or revise judicial decisions. The Legislature's broad power to enact rules of conduct did not include the power to intrude on the Judiciary's exclusive power to render final decisions in cases and controversies between private litigants.

The Justices of this Court made it clear early in the Nation's history that the courts could not be made into advisory bodies by making their decisions subject to executive or legislative revision. The Court also made it clear over a century ago that Congress does not have the power to impose rules of decision on the courts in ways that interfere with the Judiciary's ability to declare what the law is.

Section 27A is incompatible with the intentions of the Framers, the structure of the Constitution, and the precedents of this Court. Section 27A is not an exercise of the legislative power in any traditional or recognizable sense. It does not announce a new statute of limitations. It does not prescribe a rule that governs future or even past conduct. It operates only to mandate the application of a

particular rule of decision in cases in which a contrary rule of decision has already been prescribed by this Court and implemented by inferior federal courts otherwise bound to follow this Court's rulings. In short, it revises and therefore renders advisory a judgment and mandate of this Court in a fashion that, until § 27A, has never been attempted by Congress in more than two centuries.

Moreover, in order to prescribe a rule of decision in specific cases, § 27A(b) requires courts to reopen and then set aside judgments that have already been entered. In this case, the judgment that must be set aside is otherwise final and unappealable and implements the considered judicial judgment of the highest court in the Nation. Legislative intervention in judgments that are final is the worst kind of intrusion into the judicial process because it makes judicial decisions and the judgments flowing from those decisions forever vulnerable, inherently unstable and permanently open to political attack within and by the most political Branch of the Government.

Section 27A is therefore not only an immense enlargement of legislative power, it is a diminution, if not a total destruction, of judicial power. Judicial decisions become advisory opinions and the Legislature becomes the court of final resort.

The Due Process Clause, like the separation-of-powers doctrine, prohibits Congress from selecting which final decisions of courts will be overturned and which unsuccessful litigants will be made into successful ones. Legislative revision of judicial decisions strips away the protections of the judicial process and denies to litigants the rights and precautions that are the hallmarks of the exercise of the judicial power. Legislative revisions mean ultimately that neither the courts, nor their processes, are available to protect individual rights and guarantee the application of fair procedures.

ARGUMENT

I

SECTION 27A(b) MAY BE INTERPRETED TO AVOID THE SUBSTANTIAL CONSTITUTIONAL PROBLEMS ARISING FROM PETITIONERS' AND THE UNITED STATES' CONSTRUCTION OF THAT PROVISION

Petitioners and the United States interpret § 27A(b) to require, by legislative fiat, the reopening of unappealed judgments of Article III courts. As discussed below, this construction of § 27A(b) renders the provision unconstitutional under both the separation-of-powers doctrine and the Due Process Clause. This Court, however, may reasonably interpret § 27A to avoid these concerns. *See, e.g., Morrison* v. *Olson*, 487 U.S. 654, 682 (1988) ("it is the duty of federal courts to construe a statute in order to save it from constitutional infirmities").

The clearest and most straightforward construction of § 27A is to accept its words for what they literally say: federal courts are to apply limitation periods to § 10(b) cases as required by the law that existed on June 19, 1991 -- which is what this Court announced on June 20, 1991. This Court's recently re-articulated jurisprudence, as well as the text of § 27A, support that interpretation. Section 27A ordains that, for § 10(b) cases pending on June 19, 1991, the applicable limitation period "shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991." 15 U.S.C. § 78aa-1. Because this Court's "construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction," *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510, 1519 (1994), the *Lampf* decision, although rendered on June 20, 1991, necessarily articulated "the limitation period provided by the laws applicable" in every jurisdiction on June 19, 1991. As the *Rivers* Court

explained, "when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.* at 1519 n.12. Like the Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), *Lampf* "did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of [some of] the Courts of Appeals . . . [interpreting the statute at issue] were *incorrect*." *Rivers*, 114 S. Ct. at 1519.

Therefore, from a constitutional perspective, this Court's statement of the "law" on June 20, 1991, declared what the "law" was on June 19, 1991; otherwise, the Court in *Lampf* would have exceeded its Article III authority, which "is the power 'to say what the law is,' not the power to change it." *Beam*, 111 S. Ct. at 2451 (Scalia, J., concurring in the judgment) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). As this Court explained as recently as April of this year, "it is not accurate to say that the Court's decision in *Patterson* 'changed' the law that previously prevailed in the Sixth Circuit when this case was filed. Rather, given the structure of our judicial system, the *Patterson* opinion finally decided what § 1981 had *always* meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress." *Rivers*, 114 S. Ct. at 1519 n.12; *see also Harper* v. *Virginia Dept. of Taxation*, 113 S. Ct. 2510, 2523 (1993) (Scalia, J., concurring) (to assert that "[w]hen the Court changes its mind, the law changes with it" is "quite foreign to the American legal and constitutional tradition"). Thus, all courts today must conclude that the limitation period for § 10(b) cases on June 19 was exactly as this Court held on June 20.

It may well be that the language of § 27A does not reflect the intention of its sponsors as indicated in the legislative history. However, even where legislative history may reveal Congress' clear intention as to a statute's purpose, the statute's language may nevertheless "simply fail[ ] to give effect to that intention." *St. Martin*

Evangelical Lutheran Church v. *South Dakota*, 451 U.S. 772, 790 (1980) (Stevens, J., concurring). This Court must construe a statute according to its written meaning, and not according to a meaning discerned solely from its legislative history, which of course is not part of the statute enacted into law. *Cf. Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1496 (1994) ("Although the passage of the 1990 bill may indicate that a majority of the 1991 Congress also favored retroactive application, even the will of the majority does not become law unless it follows the path chartered in Article I, § 7, cl. 2 of the Constitution.").

Alternatively, regardless whether § 27A mandates application of *Lampf* and *Beam* to cases pending on June 19, 1991, its text can quite reasonably be interpreted (as it was interpreted by Judge Keith below, Pet. App. 28a-30a) to be inapplicable to cases in which final judgments had been entered and the time for appeal had expired before § 27A was enacted. Since its earliest days and most recently in cases decided last Term, this Court has "declined to give retroactive effect to statutes burdening private rights unless Congress ha[s] made clear its intent." *Landgraf*, 114 S. Ct. at 1499. Indeed, "[e]ven when Congress intends to supersede a rule of law embodied in one of [this Court's] decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the 'corrective' amendment must clearly appear." *Rivers*, 114 S. Ct. at 1519.

Thus, although § 27A(b) applies to cases that were commenced on or before June 19, 1991, and "dismissed" as untimely thereafter, it is not clear that Congress intended to apply this provision to final, nonappealable judgments, and this Court should certainly not stretch § 27A(b)'s text to import any such meaning or intent. Congress certainly knew how to draft language explicitly addressing "final judgments," having included it in the 1990 Civil Rights Act that was vetoed by the President. *See Landgraf*, 114 S. Ct. at 1492 n.8. Moreover, Congress was aware prior to enactment of § 27A(b) that if new statute-of-limitations

legislation responding to *Lampf* "applie[d] retroactively to cases finally adjudicated, there may be a separation of powers problem." *Securities Investor Protection Act of 1991: Hearings on S. 1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 379 (1991) (Cong. Research Serv. Mem.). Thus, it is not unreasonable to conclude that when Congress in 1991 failed to provide explicitly that § 27A(b) would reopen final judgments, Congress did not intend for the statute to apply to those judgments. *Cf. Landgraf*, 114 S. Ct. at 1493 ("The absence of comparable language in the 1991 Act [providing that the Act is to be applied retroactively] cannot realistically be attributed to oversight or to unawareness of the retroactivity issue."); *Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 806 (11th Cir. 1988) ("Because Congress did not clearly express an intention to have the [Handicapped Children's Protection Act of 1986] apply to final judgments rendered prior to the date the Act became law, we hold, in light of the constitutional difficulties that would otherwise arise, that the Act may not be so construed."), *cert. denied*, 490 U.S. 1090 (1989).

Respondents acknowledge that both of these interpretations are inconsistent with the motives of the proponents of § 27A, but as this Court has said elsewhere, "legislative intention, without more, is not legislation." *Train* v. *City of New York*, 420 U.S. 35, 45 (1975).

These alternative interpretations of § 27A(b) are consistent with the language of the statute and the teachings of this Court. They each avoid the serious constitutional problems raised by petitioners' and the United States' construction of § 27A(b).

II

SECTION 27A(b) VIOLATES THE SEPARATION-OF-POWERS DOCTRINE

Section 27A(b) crosses far over a line carefully drawn by the Framers of the Constitution. It is a narrowly focused effort by Congress to render a decision of this Court a nullity in cases pending on a specific day and to require Article III courts to reopen, at the behest of plaintiffs, the judgments already rendered in those cases as a direct result of this Court's "nullified" decision. Section 27A(b) is not "legislation" in any traditional sense; indeed, it changes no substantive rule of conduct and operates only retrospectively. Rather, § 27A(b) is nothing more than a rule of decision purportedly adopted pursuant to legislative authority which, if tolerated by this Court, would permit the wholesale destruction of judicial authority under Article III to provide final adjudications of private disputes otherwise committed to the jurisdiction of the federal courts by statute. Whatever may be the limits on Congress' power to revise the content of federal substantive law in the wake of a decision of this Court that may be contrary to the will of a current (or future) Congress, § 27A(b) clearly transgresses those limits and is therefore unconstitutional under separation-of-powers principles relied on by the Framers and articulated by this Court for over 200 years.

A. The Framers Viewed The Separation Of Governmental Powers As The Central And Fundamental Structural Constitutional Principle

"This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989). Indeed, "[t]he leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government," *Freytag* v. *Commissioner*,

501 U.S. 868, 111 S. Ct. 2631, 2634 (1991), and "a bulwark against tyranny," *United States* v. *Brown*, 381 U.S. 437, 443 (1965). "'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'" *Freytag*, 111 S. Ct. at 2634 (quoting *The Federalist* No. 47, at 324 (Madison) (J. Cooke ed. 1961)).

Although the separation-of-powers doctrine does not mean that the three Branches must be entirely distinct, *Mistretta*, 488 U.S. at 380, it nonetheless draws firm and carefully conceived lines that delineate the respective spheres of authority of each Branch and thereby creates self-executing checks and balances to preclude domination by any one Branch of the other two. None of the Branches was permitted "to possess directly or indirectly, *an overruling influence* over the others in the administration of their respective powers." *Id.*, at 409 (quoting *The Federalist* No. 48, at 332 (Madison)) (emphasis added). "It is this concern of encroachment and aggrandizement that has animated [the Court's] separation-of-powers jurisprudence and aroused [its] vigilance." *Id.* at 382; *see, e.g.*, *Metropolitan Washington Airports Auth.* v. *Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 111 S. Ct. 2298, 2311 (1991).

The Constitution grants to Congress extraordinarily broad powers. The Legislature was expected to be animated by "an intrepid confidence in its own strength [and] all the passions which actuate a multitude." *The Federalist* No. 48, at 334 (Madison). The Framers recognized that the Legislative Branch thus posed the greatest threat to the balance of power. "Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." *Id.* It was against the "enterprising ambition of this department, that the people" were cautioned "to indulge all their jealousy and exhaust all their precautions." *Id.*

The Judiciary, by contrast, was perceived as the weakest Branch. *See The Federalist* No. 78, at 522-23 (Hamilton). This Court has therefore been especially alert to ensure that no statute "impermissibly threatens the institutional integrity of the Judicial Branch," *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 851 (1986), or makes "inroads into functions that have traditionally been performed by the judiciary," *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (opinion of Brennan, J.).

B. The Separation-of-Powers Doctrine Prohibits Congress From Exercising Revisory Authority Over Article III Judicial Judgments

1. The Framers Intended To Bar Legislative Revision Of Judicial Decisions

The Framers were painfully aware of instances prior to the Philadelphia Convention in which colonial and state legislatures had upset final judgments or simply ordered the readjudication of a settled controversy. "[D]uring the first century or so of colonial government, legislative edicts requiring courts to reopen, vacate, rehear, or even reverse settled decisions upon the petition of the aggrieved losing party were not uncommon." Pet. App. 7a (citing G. Wood, *Creation of the American Republic 1776-1787* 154-55 (1969); *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L. Rev. 208 (1901-02)). As Justice Powell has explained, "[o]ne abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures." *INS* v. *Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring in the judgment).

The New Hampshire legislature, for example, "freely vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases, and even determined the merits of disputes."

E. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 Am. Hist. Rev. 511, 514 (1925) [hereinafter, E. Corwin, *Progress*]. Indeed, such practices "were widespread." *Id.* at 515. In Pennsylvania, the legislature remitted fines, disallowed judicially established claims and set aside jury verdicts. *Id.* at 520.[6]

Although legislative revision of final judgments apparently did not "offend the legal or political sensibilities" of the early colonial era, "these sensibilities changed considerably during the years following the outbreak of the Revolutionary War, particularly with the escalation of legislative interference in private disputes which occurred during the time of the Articles of Confederation, notably and most frequently to grant debtors 'relief' from creditors." Pet. App. 7a-8a; M.J.C. Vile, *Constitutionalism and the Separation of Powers* 153 (1967). These and other acts of legislative interference with final judgments were condemned in *The Federalist Papers* by Madison, who repeated and endorsed Jefferson's concern that the Virginia legislature had "'*in many* instances *decided rights* which should have been left to *judiciary controversy.*'" *The Federalist* No. 48, at 336 (quoting T. Jefferson, *Notes on the State of Virginia* 196 (London ed. 1787)). Madison also criticized the practice in Pennsylvania, where "the [State] Constitution had been flagrantly violated by the Legislature in a variety of important instances," including where "cases belonging to

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[6] The Provincial Legislature of Massachusetts also usurped judicial powers, including ordering the readjudication of settled controversies. For example, the legislature suspended the levying of an execution upon a judgment from a court; it voided a court's order to seize an individual's homestead as part of a judgment; and it ordered a court to hear an appeal and suspended the judgment of the lower court. *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L. Rev. 208, 210-12, 217 (1901-02).

the judiciary department [had been] frequently drawn within legislative cognizance and determination." *Id.* at 336-37.

Hamilton expressed similar concerns and stated the principle that characterized the Framers' understanding of the separation of powers: *"A legislature without exceeding its province cannot reverse a determination once made, in a particular case*; though it may prescribe a new rule for future cases." *The Federalist* No. 81, at 545 (emphasis added); *see also id.* at 544 (discussing "absurdity" of permitting legislative revision of judicial judgments because the "pestilential breath of faction may poison the fountains of justice").

The views of Madison, Jefferson and Hamilton reflected the thoughts and actions of the Framers in drafting the Constitution. The Constitutional Convention rejected several proposals to allow for legislative revision of judicial judgments.[7] Reviewing the history of the Philadelphia Convention, "[a] clearer rejection of congressional authority over judicial powers is hard to imagine." R. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest For the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 791 (1984).

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[7] The Convention rejected a proposal that would have permitted legislative revision of certain federal court decisions by establishing the Congress as the "last Resort on Appeal in Disputes between two or more States," 1 M. Jensen, *The Documentary History of the Ratification of the Constitution* 246-47 (1976), and also a motion for the Constitution to provide that "the Judicial power shall be exercised in such manner as the Legislature shall direct," 1 J. Goebel, *History of the Supreme Court of the United States* 243 n.228 (1971) (citing 2 M. Farrand, *Records of the Federal Convention of 1787* 424-25, 431 (1911)).

2. This Court Has Made Clear That Congress Is Precluded From Revising Final Judgments Of Article III Courts And From Directing The Courts To Apply Particular Rules Of Decision To Decide Cases

The "judicial Power" vested in this Court and other Article III courts is, "by the express provision of" that Article, "limited to 'Cases' and 'Controversies.'" *Morrison*, 487 U.S. at 677; *e.g.*, *Mistretta*, 488 U.S. at 385; *Muskrat* v. *United States*, 219 U.S. 346, 356 (1911). The words "Cases" and "Controversies" work to limit the role of federal courts to that of determining rights and obligations of individual litigants in particular cases in accordance with the governing law. *See, e.g., Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (1825) (Marshall, C.J.); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816 (1987) (Scalia, J., concurring in the judgment) (the role of a federal judge is "to decide, in accordance with law, who should prevail in a case or controversy"). The power of judicial review derives from "the essence of judicial power," that is, the power "to say what the law is," *Marbury*, 5 U.S. (1 Cranch) at 177. But that power may only be exercised in the context of a case or controversy. Indeed, that limitation is the primary check in the Constitution against judicial overreaching.

The irreducible core of the authority of Article III courts to decide cases and controversies is the power to enter judgments that are final and conclusive of the rights of private litigants. As one scholar explained, "to produce judicial review, the notion of the Constitution as law must be accompanied by the principle of the finality of judicial constructions of the law." E. Corwin, *Progress*, at 524. For if final judicial determinations in particular cases could be overturned by legislative or executive action, federal courts would be rendered "'mere boards of arbitration whose judgments and decrees would be only advisory,'" *Young*, 481 U.S. at 796 (quoting *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)). Thus, "[i]t has long been settled that a federal court has no authority . . .

'to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology* v. *United States*, 113 S. Ct. 447, 449 (1992) (citation omitted).

Consequently, the Members of this Court have recognized since *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), that the judgments of Article III courts adjudicating private rights cannot be reopened by the Legislative Branch.[8] *Hayburn's Case* arose from a statute enacted by Congress in 1792, authorizing pensions for disabled Revolutionary War veterans. *See* Act of Mar. 23, 1792, ch. 11, 1 Stat. 243. The statute provided for an applicant to file a claim with a federal circuit court, which then was to certify and transmit the claim "to the Secretary at War, together with [the court's] opinion in writing" of the pension amount to which the applicant was entitled. *Id.* § 2, 1 Stat. at 244. The Secretary could then accept the recommendation of the court or, if he had "cause to suspect imposition or mistake," the Secretary could "withhold the name of such applicant from the pension list, and make report of the same to Congress, at their next session." *Id.* § 4, 1 Stat. at 244.

Sitting as the New York Circuit, Chief Justice Jay, Justice Cushing and District Judge Duane concluded that federal judges could not, in their capacity as an Article III court, adjudicate claims under the statute. *Hayburn's Case*, 2 U.S. (2 Dall.) at 410; *Mistretta*, 488 U.S. at 402. The court reasoned that the duties assigned to the circuit by the statute were not "properly judicial" under Article III because the decisions of the court were subjected "first to the consideration and suspension of the secretary at war,

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[8] The views of the Justices in *Hayburn's Case* "have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution." *Morrison*, 487 U.S. at 677 n.15; *accord Mistretta*, 488 U.S. at 402-03 (*Hayburn's Case* is one of "our precedents").

and then to the revision of the legislature." *Hayburn's Case*, 2 U.S. (2 Dall.) at 409. The court also reasoned that Congress does not have the authority under Article I to overturn the judgment of an Article III court, concluding that "by the constitution, neither the secretary at war, nor any other executive officer, *nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.*" *Id.* at 409 (emphasis added).

Sitting as the North Carolina Circuit, Justice Iredell and District Judge Sitgreaves reached a similar conclusion: "inasmuch as the decision of the court is not made final, but may be at least suspended in its operation, by the secretary at war, if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a mode of revision, which we consider to be unwarranted by the constitution." *Id.* at 413. The court added "that no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments." *Id.* And, sitting as the Pennsylvania Circuit, Justices Wilson and Blair and District Judge Peters also determined that federal courts could not adjudicate claims under the act, reasoning that "the business directed by this act is not of a judicial nature" and that the "revision and control" of the "judgments" of Article III courts by either Congress or the Executive Branch is "radically inconsistent with the independence of that judicial power which is vested in the courts." *Id.* at 411.

Thus, in *Hayburn's Case* the Justices recognized that an indispensible requirement for the exercise of Article III judicial power is the authority to adjudicate cases and controversies with finality, and that Congress therefore lacks the power under Article I to reverse judgments of Article III courts.

The views expressed by the Justices in *Hayburn's Case* regarding the necessary finality of Article III judgments resonate throughout this Court's later decisions and have never been reversed. For example, in *Massingill* v. *Downs*, 48 U.S. (7 How.) 760, 768 (1849), the Court declared that "where the right has attached in the courts of the United States, a State has no power, by legislation or otherwise, to modify or impair it. Retrospective laws of a remedial character may be passed; but no legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment." In *United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1874), the Court held that "inasmuch as the Constitution does not contemplate that there shall be more than one Supreme Court, it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government." And, in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948), the Court declared that "[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."

Indeed, the essence of an Article III judgment is that it is "final and conclusive upon the rights of the parties." *Gordon v. United States*, 117 U.S. 697, 702 (decided 1864, Opinion printed in Appendix 1885). Accordingly, if a federal tribunal's final judgments are subject to revision by either the Legislative or Executive Branch, the tribunal cannot be said to exercise judicial power "in the sense in which judicial power is granted by the Constitution to the

courts of the United States." *United States* v. *Ferreira*, 54 U.S. (13 How.) 40, 52 (1851).[9]

Although, since *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), the Court has, in certain carefully confined circumstances, permitted Congress to enact legislation that applies retroactively and thereby affect a *pending* case, *id.* at 110, the Court has also consistently emphasized that Congress lacks authority to alter private rights as determined by the final judgment of an Article III court once the "case's journey through the courts [has] come[] to an end," *Georgia Ass'n of Retarded Citizens*, 855 F.2d at 813; *see, e.g.*, *Pennsylvania* v. *The Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855) ("*Wheeling Bridge II*"); *The Clinton Bridge*, 77 U.S. (10 Wall.) 454, 463 (1870); *Hodges* v. *Snyder*, 261 U.S. 600, 603-04 (1923).

The *Wheeling Bridge* cases are not to the contrary. Indeed, they support the points made in the foregoing paragraphs. *Wheeling Bridge II* held that Congress has the authority to change the consequences of a final judgment of an Article III court to the extent that the judgment orders *prospective* relief affecting *public rights*. But the Court also held that Congress could not have reopened the case had the judgment at issue involved the final adjudication of private rights for legal damages. The controversy in *Wheeling Bridge* arose from the Court's decision in 1852 that a bridge was an impermissible obstruction of interstate navigation and ordering that it be raised to a certain height.

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[9] *Accord United States* v. *Mitchell*, 463 U.S. 206, 213 n.12 (1983); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 582 (1962); *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400-01 (1934); *Williams* v. *United States*, 289 U.S. 53, 563-64 (1933); *District of Columbia* v. *Eslin*, 183 U.S. 62, 65 (1901); *In re Sanborn*, 148 U.S. 222, 224 (1893); *United States* v. *Waters*, 133 U.S. 208, 213 (1890); *Gordon*, 117 U.S. at 703.

Pennsylvania v. *The Wheeling & Belmont Bridge*, 54 U.S. (13 How.) 518 (1852) ("*Wheeling Bridge I*"). Congress subsequently enacted legislation declaring the bridge to be a lawful structure and a designated post road. In *Wheeling Bridge II*, the Court held that the *Wheeling Bridge I* decree could be modified to the extent that it granted prospective relief (*i.e.*, an injunctive decree) and involved the "public right of the free navigation of the river." 59 U.S. (18 How.) at 431.

The Court in *Wheeling Bridge II*, however, was careful to point out that if *Wheeling Bridge I* had involved the "adjudication of the private rights of parties" and the remedy sought had been damages, the final judgment "would have passed beyond the reach of the power of congress." *Id.* In these circumstances, the Court observed, "the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff." *Id.*; *see also The Clinton Bridge*, 77 U.S. (10 Wall.) at 463 (*Wheeling Bridge II* concluded "that if the remedy had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the power of Congress"). Therefore, "[t]he decree before us . . . [adjudging] costs" -- the private rights aspect of the judgment concerning the award of retrospective monetary relief -- "is unaffected by the subsequent law." *Wheeling Bridge II*, 59 U.S. (18 How.) at 431; *see also Hodges*, 261 U.S. at 603-04 (*Wheeling Bridge II* held that "in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away").

The *Wheeling Bridge II* Court's distinction between final judgments adjudicating private rights and executory decrees affecting public rights is consistent with this Court's recognition that a claim involving private rights is "a claim of the kind assumed to be at the 'core' of matters reserved to Article III courts." *Commodity Futures Trading Comm'n*, 478 U.S. at 853; *Northern Pipeline*, 458 U.S. at

70 (opinion of Brennan, J.) ("Private disputes . . . are at the core of the historically recognized judicial power."). And *Wheeling Bridge II*'s distinction between judgments for monetary damages and injunctive relief recognizes that injunctive decrees are, in a sense, "'legislative' in function, attempting to control the legal status of a variety of future actions which the parties, or others, might or might not wish to take." *Daylo* v. *Administrator of Veterans' Affairs*, 501 F.2d 811, 818 (D.C. Cir. 1974). "Since injunctive relief necessarily depends on a continuing affront to one's legal rights, while legal relief depends only on a judicial determination that one's legal rights have been violated with resulting cognizable damage to the claimant, Congress could permissibly change the law so as to deprive a party of its right to injunctive relief." Pet. App. 16a-17a; *cf. Landgraf*, 114 S. Ct. at 1501 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.").

The Court has been equally sensitive to efforts by Congress to prescribe rules of decision. *See United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). In *Klein*, the Court struck down an act of Congress purporting to change the legal significance of a presidential pardon in certain pending cases because it "prescribe[d] a rule for the decision of a cause in a particular way" without changing the law for the future -- or in the language of the Court, without creating "new circumstances" in the law. *Id.* at 146-47. And in *Hurtado* v. *California*, 110 U.S. 516 (1884), the Court emphasized that, to be a proper legislative act, a statute "must be not a special rule for a particular person or a particular case." *Id.* at 535. Although this Court in *Robertson* v. *Seattle Audubon Society*, 112 S. Ct. 1407 (1992), upheld certain legislation affecting specific cases, that legislation had prospective effect on the law. *See id.* at 1410-11 (legislation at issue effected "a comprehensive set of rules to govern [timber] harvesting within a geographically and temporally limited domain . . . . [It] both required harvesting and expanded harvesting restrictions . . . . [And it] specified general

environmental criteria to govern the selection of harvesting sites by the Forest Service"). This Court has never upheld legislation that has no prospective effect, but serves only to direct a particular rule of decision to adjudicate private rights in pending Article III cases.

As the following paragraphs clearly demonstrate, § 27A(b) compounds the concerns expressed by the Justices in *Hayburn's Case* and the Court in *Klein*. It reopens for revision the final judgments of Article III courts and prescribes a rule of decision squarely at odds with this Court's final adjudication of "what the law is" in those cases.

C. Section 27A(b) Is An Impermissible Attempt By Congress To Reopen And Revise The Judgments Of Article III Courts

The parties all agree that *Hayburn's Case* and its progeny prohibit Congress from exercising revisory authority over Article III judicial decisions. *See, e.g.*, U.S. Br. at 12 (Congress may not "review[ ] the judgments of Article III courts."); Pet. Br. at 20 n.15 ("Congress clearly cannot reverse results in particular controversies between private parties."). There is similarly no dispute that Congress cannot "'prescribe a rule for the decision of a case in a particular way' without changing the underlying law." *Id.* (quoting *Klein*) As shown below, § 27A(b) constitutes both a "reopening" and "revision" of judicial decisions within the meaning of *Hayburn's Case*, and the prescription of a rule of decision within the meaning of *Klein*. Thus, a careful review of what § 27A(b) does -- and does not do -- demonstrates that this provision combines the worst features of previous congressional efforts to undermine and usurp judicial functions.

1. Section 27A(b) Is An Exclusively Retroactive Rule Of Decision That Seeks To Reopen And Reverse The Judgments Of This Court In *Lampf* And Of Lower Courts That Had Dismissed § 10(b) Cases As Untimely Under *Lampf* Prior To § 27A(b)'s Enactment

As demonstrated in respondents' recitation of the legislative history of § 27A above, pp. 3-7, the purpose and interest of Congress in enacting § 27A were, unabashedly, to recall the mandate and reverse the judgment of this Court in *Lampf* as to the parties in that case and to nullify the application of *Lampf* to all other § 10(b) cases pending in the courts as of June 19, 1991, including § 10(b) cases in which final judgments had been entered based upon application of *Lampf* prior to the enactment of § 27A. These were not incidental effects of § 27A; as discussed above, they are the *only* effects of § 27A as enacted. The net of it is that § 27A attempts to reduce *Lampf* to a totally advisory opinion with regard to the parties in *Lampf* and the parties to all § 10(b) cases pending on June 19, 1991.

The Court in *Lampf* held that the statute of limitations for § 10(b) cases was one year after plaintiff's discovery of the alleged fraud, but no more than three years after the violation occurred. The Court evaluated the facts before it in *Lampf*, decided that the plaintiffs' § 10(b) claims were untimely under this rule, and entered a judgment dismissing the claims. As a result of and in reliance on § 27A(b), however, the district court granted the *Lampf* plaintiffs' motion to reinstate their § 10(b) claims despite this Court's decision that the claims were untimely. *See Gilbertson* v. *Leasing Consultants Assocs.*, No. 86-1369-RE (D. Or. Feb. 6, 1992) (ten copies of the district court's reinstatement order have been lodged with the Clerk). Because the *Lampf* case was "commenced . . . before June 19, 1991," 15 U.S.C. § 78aa-1(b), "dismissed as time-barred subsequent to" that date by this Court and "would have been timely," *id.*, under the pre-*Lampf* rule applied by the Ninth Circuit, the district court in *Lampf* ruled that it had no choice but to reject this Court's

otherwise binding determination of the law as applied to the parties in that case.

Section 27A(b) was also intended to overturn the *Lampf* decision's applicability to all other cases that were pending on June 19, 1991, by directing the lower federal courts to ignore this Court's interpretation of § 10(b) in deciding those cases. In so doing, Congress correctly recognized that this Court's decision in *Beam* would be held to require full retrospective application of *Lampf* to all § 10(b) cases that were, as of June 20, 1991, pending in any trial or appellate courts. Thus, Congress was seeking to obliterate a constitutionally compelled component of the exercise of Article III judicial power, what this Court subsequently articulated as "the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions . . . for nearly a thousand years.'" *Harper*, 114 S. Ct. at 2516 (quoting *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)). If Congress may strip this Court, and all inferior federal courts, of an essential attribute of the *judicial* function -- declaring the law and applying that law to pending cases -- as it has attempted to do by enacting § 27A, there would be no barrier to Congress' doing so in any circumstance. But that is neither the business of Congress under our separation of powers, nor is it tolerable given the independence of the federal judiciary guaranteed by Article III.

Following the requirements of this Court's rulings in *Lampf* and *Beam*, the district court in this case exercised its core Article III power and issued a final (although appealable), binding and conclusive decision dismissing the case with prejudice. No appeal was taken. Congress then decided it did not like the result required by *Lampf* and *Beam* and reached out to overrule the district court's decision on the precise point on which it had entered final judgment in favor of respondents. In every sense of the word, Congress has revised the decision of the district court in this case in the course of revising, retrospectively, the decisions of this Court in *Lampf* and *Beam*, and has

prescribed a rule of decision directly contrary to the rule prescribed by this Court and applied below.

Indeed, § 27A(b) presents a far more serious and immediate separation-of-powers problem than the statute in *Hayburn's Case*. The *Hayburn's Case* Justices concluded that Congress could not vest non-Article III tribunals, either the Secretary of War or the Congress, with the potential authority to revise judicial decisions. However, neither Congress, nor the Secretary of War for that matter, had actually sought to revise a decision in *Hayburn's Case*, let alone to impose a rule of decision contrary to that applied by the federal courts in order to change the results in cases.

Section 27A(b) also is more egregious than the statute struck down by this Court in *Klein*. Like the statute at issue in *Klein*, § 27A(b) "prescribes a rule for the decision of a cause in a particular way" without changing the existing law for future cases. But unlike § 27A(b), the statute in *Klein* did not revise or reverse final judgments, dictating a new rule only in cases that were still alive in the federal courts.

Section 27A(b)'s purely revisory effect is made even more obvious by the fact that it has no prospective effect whatever. The statute's attempt to prevent the application of this Court's judgment and mandate in *Lampf* to § 10(b) cases pending in the courts as of June 19, 1991, cannot be rationalized as ancillary to an exercise of Congress' primary legislative function, which is to make policy judgments and enact rules of law to govern future conduct, even if such a rationalization would save a broader statute. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 370-71 (1989) ("'Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter'") (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908) (Holmes, J.); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513 (1989) (Stevens, J., concurring in part and concurring in the judgment) ("Legislatures are primarily

policymaking bodies that promulgate rules to govern future conduct."). Certain Members of Congress may have wanted to overrule *Lampf*, but they did not have the votes to do so. Therefore Congress did not enact a new statute of limitations with general application to govern future conduct and future § 10(b) claims. Rather, it settled for enactment of § 27A, which is concerned *only* with changing the results of specific decisions of Article III courts that Congress did not like, and nothing else.

2. The Attempts Of Petitioners And The United States To Distinguish § 27A(b) From Impermissible Legislative Intrusions On Judicial Authority Are Without Merit

a. It is of no legal significance that § 27A(b) requires plaintiffs to decide whether to invoke its benefits.

The United States apparently concedes that, under *Hayburn's Case*, "if Congress enacted a self-executing statute that purported to set aside the judgment of a court," that statute would violate the separation of powers. U.S. Br. at 14. The Government's focus on the fact that § 27A(b) is not, as the Government puts it, "self-executing," is difficult to fathom. Perhaps the Government is simply arguing that Congress may eviscerate the final exercise of Article III judicial power indirectly (by placing the necessary tools in the hands of a class of private litigants), even though Congress may not do so directly. Congress, however, may not accomplish by indirection what the constitutional separation of powers forbids Congress to do directly. *See Metropolitan Washington Airports Auth.*, 111 S. Ct. at 2307-12 & n.4 (Congress could not exercise the executive power indirectly through representatives' membership on board of review).

The Government, consistently with this flawed premise, proceeds to argue that § 27A(b) is not comparable to the statute at issue in *Hayburn's Case* because "the plaintiff must file a motion with the court invoking the legal standards provided by Section 27A; the court then applies

those standards." U.S. Br. at 15. But § 27A(b) commands the courts to vacate final judgments in cases that "would have been timely filed" under the pre-*Lampf* legal rules, leaving no more discretion to the courts than a decision of this Court reversing a lower court ruling and remanding for further proceedings consistent with the Court's opinion. Private litigants always possess the freedom to determine whether to prosecute civil litigation. For constitutional purposes, Congress' decision to provide for the reopening of only those cases in which the plaintiff wishes to do so by filing a motion to reinstate is functionally indistinguishable from a "self-executing statute" that requires automatic reinstatement subject to a plaintiff's freedom voluntarily to dismiss the litigation following reinstatement. Therefore, § 27A(b)'s procedural mechanism for overturning final judgments does not protect judicial independence or mitigate the seriousness of Congress' intrusion into core judicial functions.

b. It is not legally significant that Congress did not acknowledge that it was acting like a court.

The United States also asserts that § 27A(b) is valid because "Congress did not 'sit as a court of errors' to review the validity of judicial judgments under existing rules of decision." U.S. Br. at 13 (citing *Hayburn's Case*, 2 U.S. (2 Dall.) at 410). As discussed above, however, the sponsors of § 27A(b) certainly believed they and their colleagues were acting as a "court of errors," and the text of § 27A(b) belies the Government's assertion because the only cases upon which § 27A(b) operates are cases that were dismissed prior to the enactment of § 27A(b).

Furthermore, the decisions of this Court and the lower federal courts make clear that to exercise "judicial Power" impermissibly, Congress need not assemble in a courtroom and literally "sit as a court of errors" as the Government's narrow reading of *Hayburn's Case* would suggest. The rule in *Hayburn's Case* is a prohibition on Congress' failing to give "binding and conclusive" effect to the final judgments of an Article III court. *Chicago & Southern Air*

Lines, 333 U.S. at 113-14; *Gordon*, 117 U.S. at 702. Simply stated, Congress exceeds its legislative authority and impermissibly intrudes on the Judicial Branch when, as it does with § 27A(b), it directs the reopening of final, nonappealable judgments of Article III courts in private rights cases. Indeed, Justice Iredell (one of the Justices in *Hayburn's Case*) made clear six years after *Hayburn's Case* his understanding that legislative powers generally do not include the authority to reopen final court judgments. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). In *Calder*, the Connecticut legislature had enacted a statute setting aside a final judgment entered by a court of that State in a civil case. Prior to enactment of the statute, the plaintiffs "were barred of all right of appeal," having not appealed within the prescribed time for appeal. *Id.* at 386-87. The effect of the statute was therefore identical to that of § 27A(b) -- "to revise" the final judgment of the court by "direct[ing] a new hearing of the case by the same court." *Id.* at 387 (Chase, J.). Justice Iredell observed that "[i]t may, indeed, appear strange to some of us, that in any form, there should exist a power [in the legislature] to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions." *Id.* at 398. He also stated that the power to "superintend the courts of justice" is "judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority." *Id.*

c. Congress not only reopened this case, it directed how it shall be decided.

Congress did even more here than simply reopen final judgments. It trumped this Court's *Lampf* decision and acted as the ultimate appellate court when it enacted § 27A(b), deciding that the "law" on June 19, 1991, was not what this Court declared it to be in *Lampf*, and ordering the Article III courts below to ignore the decision of this Court, and, instead, apply a rule of decision that this Court in *Lampf* had decided was "*incorrect*." *Rivers*, 114 S. Ct.

at 1519. Therefore § 27A(b) substituted Congress' judgment for this Court's judgment as to the proper interpretation of § 10(b). It is difficult to imagine a more direct or more unrestrained usurpation. Alexander Hamilton would certainly be astonished to learn that the Constitution he described in *The Federalist Papers* "committed the judicial power in the last resort" to the legislature. *The Federalist* No. 81, at 544.

d. The constitutional deficiencies of § 27A(b) do not disappear by calling it a "law."

The United States also argues that simply because Congress created § 27A(b) by "passing a law" (*i.e.*, enacting a bill by majority vote of both Houses of Congress that was signed by the President), § 27A(b) constitutes a proper exercise of legislative power. *See, e.g.*, U.S. Br. at 13; *see also* Pet. Br. at 22-23. Congress, however, virtually *always* must act in this manner, and the fact that it did so here provides no answer to the question whether its enactment exceeded the bounds of both Articles I and III. *Cf. Hurtado*, 110 U.S. at 535 ("It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power."). The Court must "[l]ook[ ] beyond form to the substance of what [§ 27A(b)] accomplishes." *Thomas* v. *Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 589 (1985); U.S. Br. at 25 n.18. Congress passed many laws giving itself the power to exercise legislative vetoes, but those laws did not make the device constitutional. *Chadha*, 462 U.S. at 944-59. Instructing the courts to set aside their final decisions and apply a particular rule of decision is an act of judicial power despite its bicameral approval. The Framers did not separate judicial and legislative powers and simultaneously authorize Congress to breach that separation whenever it passed a "law."

The effect of § 27A(b) would have been precisely the same had Congress listed the cases by name and docket number that it wished to reverse, and declared: "Such cases were wrongly decided and are hereby reversed and

reinstated even though we [Congress] did not choose to adopt a new statute of limitations for cases filed after June 19, 1991." Congress' linguistic ingenuity cannot cure the blatant separation-of-powers violation effected by § 27A(b). *Cf. Brown*, 381 U.S. at 443.

e. Congress did not create a new right of action.

The United States argues that "[a]s a matter of substance, Section 27A(b) is no different in effect than the creation of a new right of action that duplicates the elements of Rule 10b-5, but that contains a new, and longer, statute of limitations." U.S. Br. at 25. This "argument" is no more than linguistic legerdemain. In the first place, § 27A does not even purport to create a new right of action; the right of action before and after the enactment of § 27A(b) is the result of judicial implication of that right for nearly five decades. Congress might someday choose to change it, but § 27A does not even purport to do so.

Second, § 27A leaves in place the substantive rule of law decreed by the *Lampf* Court while prohibiting the application of that rule of law to cases that were pending on June 19, 1991. In no sense does § 27A create "a new, and longer, statute of limitations" for § 10(b) cases pending on June 19, 1991. In fact, § 27A returns the interpretation of the § 10(b) statute of limitations in that narrow class of cases to precisely the chaos in which a plethora of conflicting state and federal rules co-existed prior to this Court's decision in *Lampf*. It certainly would not have been irrational, in the constitutional sense, for Congress -- in dealing with the merits of *Lampf* -- to establish prospectively a different federal statute of limitations for § 10(b) actions or to decide that state rules should apply. For Congress to legislate the pre-*Lampf* chaos, however, for a small collection of cases is both irrational and unconstitutional.

The fact is that Congress considered but failed to enact a new statute of limitations to govern future and past

§ 10(b) violations. It therefore resorted to reversing court decisions. It created no new rights of action and no new statute of limitations.

Congress appears never to have enacted a statute like § 27A(b). Despite the Government's speculation that Congress could constitutionally enact a statute that "lifts the bar of res judicata" in purely private litigation and authorize a new suit based on the same facts involving the same parties, it does not refer to a single instance where Congress has taken such action. *See* Oral Argument Tr. in *Morgan Stanley* at 49 (conceding that the United States knows of no case in which Congress attempted to set aside a judgment or eliminate the res judicata effect of a judgment involving only private parties).

Surely the United States should not be arguing that § 27A(b) is constitutional because it is "in substance . . . no different than" other arguably less intrusive and therefore permissible legislative actions. That kind of logic would eviscerate entirely the separation-of-powers doctrine, and can be made to defend almost any congressional activity. It has no limiting principle, and it would require the United States to confess error in *Chadha*. Indeed, the logic that the United States advances would permit Congress to convene adversarial hearings to decide appeals by majority vote in any case -- or to decide those appeals without adversarial proceedings in the pre-dawn hours with non-germane riders in the manner that it now dispenses highway funds and grants to universities.

In short, § 27A(b), and the United States' arguments defending it, "provide[ ] a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role." *Metropolitan Washington Airports Auth.*, 111 S. Ct. at 2312.

f. Precedents involving territorial courts and administrative decisions do not support intrusions on the power of the Article III Judiciary.

Petitioners and the United States cite *Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 239 (1833), *Freeborn* v. *Smith*, 69 U.S. (2 Wall.) 160, 175 (1864), and *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899), as precedent for Congress' reopening of the final judgment here. In those cases, however, the judgments subjected to legislative revision were not rendered by Article III courts but by entities that the Constitution places under the plenary control of Congress. *See Freytag*, 111 S. Ct. at 2656-57 (Scalia, J., concurring in part and concurring in the judgment); J. Story, *Commentaries on the Constitution of the United States* (R. Rotunda & J. Nowak eds., 1987 reprint) (1833) ("the courts of the territories are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are legislative courts, created in virtue of the general sovereignty, which exists in the national government over its territories. The jurisdiction, with which they are invested, is not a part of the judicial power, which is defined in the third article of the constitution"). Moreover, *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940), upheld a private bill reopening an administrative order and therefore did not constitute an "excursion of the Congress into the judicial function" or "affect[ ] judicial judgments." *Id.* at 381 & n.25.

3. The Statute In *Sioux Nation* Did Not Reopen A Final Judgment, But Rather Constituted An Exercise Of Congress' Debt-Paying Power

Petitioners and the United States rely extensively on *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980). *Sioux Nation*, however, involved a statute by which Congress "waive[d] the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States." *Id.* at 397. The Court's

holding was exceedingly narrow: "Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers." *Id.* at 407. This holding was expressly predicated on Congress' "broad power to recognize and pay the Nation's debts," *id.* at 405, a power obviously not remotely involved in this case. Relying on a "legion" of prior cases authorizing Congress to waive res judicata and other affirmative defenses of the Government, *id.* at 399 n.24, the Court concluded that it was "clearly establish[ed] that Congress may recognize its obligation to pay a moral debt not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States," *id.* at 397.

The Court's holding was also predicated on its observation that in enacting the statute there at issue, "Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments." *Id.* at 407. In contrast, in considering and enacting § 27A, it is clear that Congress *was* reviewing this Court's decision in *Lampf* and asserting the power to disturb final judgments.

Sioux Nation is additionally distinguishable because it implicates the "public rights" strand of the separation-of-powers doctrine, which "extends only to matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,' and only to matters that historically could have been determined exclusively by those departments." *Northern Pipeline*, 458 U.S. at 67-68 (opinion of Brennan, J.) (citation omitted). As with the legal principle in *Sioux Nation*, the public rights doctrine "may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued." *Id.* at 67. The doctrine also recognizes that where, as in *Sioux Nation*,

Congress is capable of conclusively determining an issue -- such as whether and how to pay a debt of the United States -- without resort to the courts, it is acting pursuant to an "exceptional grant of power" that permits it to operate with greater freedom from "the general prescriptions of Art. III" even if it determines to commit some aspect of the decisionmaking process to the Judicial Branch. *See id.* at 69-70 & n.23.

Sioux Nation therefore neither addressed nor resolved the question presented by the case at bar. In fact, the Court apparently recognized that if Congress had not been exercising its debt-paying power and acting on behalf of the United States in its capacity as a litigant to waive its rights, but instead had "disturbed the finality of a judicial decree" in private litigation, its actions would have violated the principles set forth in *Hayburn's Case*, as well as "interfer[ed] with the independent functions of the Judiciary." *Sioux Nation*, 488 U.S. at 391-92; *see also id.* at 406 (noting that Congress had not "brought into question the finality of . . . earlier judgments"); *id.* at 429 (Rehnquist, J., dissenting) ("[A]s the Court apparently concedes, Congress may not . . . review and set aside a final judgment of an Art. III court, and order the courts to rehear an issue previously decided in a particular case.").

D. The Fact That The Final Judgment Is Predicated On A Statute-Of-Limitations Defense Is Irrelevant To The Question Presented

The United States asserts that a final judgment based upon statute-of-limitations grounds is entitled to less constitutional protection from legislative interference than judgments resting on other grounds. *See* U.S. Br. at 40-41. But there is no basis in logic or the Constitution for this argument.

It is widely recognized that a final judgment based on statute-of-limitations grounds is a judgment on the merits, *see, e.g., United States* v. *Oppenheimer*, 242 U.S. 85, 87-88 (1916) ("A plea of the statute of limitations is a plea to

the merits, . . . and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution.") (citation omitted); *Johnston*, 14 F.3d at 492, and the Federal Rules of Civil Procedure draw no distinction between a final judgment resting on limitation grounds and other types of final judgments, *see, e.g.*, Fed. R. Civ. P. 41(b). "Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Board of Regents* v. *Tomaino*, 446 U.S. 478, 487 (1980). Indeed, this Court has often explained that limitation periods are "vital to the welfare of society and are favored in the law" because "[t]hey promote repose by giving security and stability to human affairs." *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879); *accord McCloney* v. *Silliman*, 28 U.S. (3 Pet.) 269, 277 (1830); *Burnett* v. *New York Central Ry. Co.*, 380 U.S. 424, 428 (1965); *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988).

The 1-and-3-year statute of limitations is an integral element of the § 10(b) private right of action. Congress enacted § 10(b) as part of a statutory scheme containing express private rights of action that, with only one exception not relevant here, contained the same basic 1-and-3-year statute of limitations. *Lampf*, 111 S. Ct. at 2780. That restraint on the assertion of private claims for relief was adopted only after extensive debate aimed at attaining an important substantive balance between the rights of victims of misconduct and the disincentives to the capital formation process that would result from a longer limitation period. *See, e.g.*, 78 Cong. Rec. 10,186 (June 1, 1934) (statement of Sen. Byrnes); 78 Cong. Rec. 8,200 (May 7, 1934) (statement of Sen. Byrnes). In *Lampf*, this Court concluded that Congress would have intended those same policy choices to apply to the remedy implied under § 10(b) which were an essential part of the entire comprehensive regulatory scheme adopted by the same Congress that enacted § 10(b). *See* 111 S. Ct. at 2780.

Even if the foregoing considerations are ignored, however, the sweeping arguments of petitioners and the United States concerning the authority of Congress to overturn final judgments could not be limited to statutes of limitations. A constitutional rule requiring courts (and Congress) to make *ad hoc* and subjective value judgments about the relative "worth" of judgments according to the legal theory that supports them would be completely unworkable. Thus, if *Hayburn's Case* does not limit Congress' authority to set aside all final judgments in cases involving private parties and legal damages, then all such judgments may be set aside by Congress, no matter what their legal basis. In fact, the United States, in its argument in *Morgan Stanley* last Term, correctly conceded that its separation-of-powers arguments in defense of § 27A(b) are *not* confined to statute-of-limitations judgments. *See* Tr. of Oral Arg. in *Morgan Stanley* at 46 (arguing that Congress could overturn final judgments of dismissal entered as a result of the Court's decision rejecting an aider-and-abettor cause of action in § 10(b) cases).

E. Section 27A(b) Is Fundamentally Different From Federal Rule of Civil Procedure 60(b)

The United States, citing Rule 60(b) of the Federal Rules of Civil Procedure, contends that § 27A(b) is but a "small variation on current practice" of the federal courts concerning whether and when a final judgment may be reopened. U.S. Br. at 23-25; *see also* Pet. Br. at 29-30. Section 27A(b)'s directive that courts set aside a specific category of judgments has, however, no kinship with historical and current practice under Rule 60(b), which vests sole authority and discretion in the courts to make decisions about when judgments may be set aside.

Rule 60(b) articulates this historic, exclusive power of the courts to reopen judgments in certain narrow instances, none of which apply here. The equitable power of courts to grant such relief from final judgments in extraordinary cases, such as where the judgment had been obtained by fraud, existed "[f]rom the beginning" and was "firmly

established in English practice long before the foundation of our Republic." *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 234, 244 (1944); *see* Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 Temple L.Q. 77, 78-80 (1951).

"[U]nder Rule 60(b), final judgments are subject to a case-by-case evaluation by a tenured judge who is free from political pressure," *Johnston*, 14 F.3d at 493-94, and the decision to reopen a final judgment is left to the court's "narrow" discretion free from any control, direct or indirect, by Congress, *id.* at 493. Indeed, courts have interpreted Rule 60(b) not to require relief from a judgment merely because Congress has changed the law on which the judgment is based. *See, e.g., id.* at 497; *Daylo*, 501 F.2d at 823 (pointing out in ruling on a Rule 60(b) motion that Congress cannot disturb rights vested in a final judgment that is no longer subject to appeal); *see also Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 400-01 (1981) (parties that make a "'free, calculated, deliberate choic[e]' not to appeal" are not entitled to Rule 60(b) relief even where subsequent decision of this Court supplies new grounds for appeal and refusal to reopen the judgment would have resulted in inequities) (citation omitted).

Section 27A(b), by contrast, directly interferes with judicial power by *requiring*, at the behest of disappointed litigants, federal courts to reopen final judgments, depriving them of discretion to make such determinations. Thus, "Rule 60(b) in no way threatens judicial autonomy or implicates the separation of powers." Pet. App. 15a n.13. The "question [in this case] is not whether *the courts* may disturb final judgments, but whether *Congress* may disturb them." *Id.*

III

SECTION 27A(b) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Section 27A(b) is also constitutionally invalid because it deprives litigants of vested rights without due process of law. In this regard, the separation-of-powers doctrine and the Due Process Clause are intertwined and complementary: whereas final judgments are protected under the separation-of-powers doctrine in order to ensure the institutional integrity and authority of the Judicial Branch and thereby protect individuals from tyrannical government, the Due Process Clause affords citizens protection from arbitrary congressional action destroying rights established by a final judicial judgment.

Like other intangible rights, *see, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-12 (1984) (trade secrets), a final, unappealed judgment gives rise to a property right, and because a final judgment represents a decisive and conclusive declaration of rights between parties, this Court has characterized such rights as "absolute," *Wheeling Bridge II*, 59 U.S. (18 How.) at 431, regardless of subsequent legislation to the contrary, *see Hodges*, 261 U.S. at 603. A final judgment in favor of a defendant vests the defendant with the conclusive right *not* to pay damages -- an especially valuable right in the context of federal securities litigation, where it is not uncommon for plaintiffs to seek tens if not hundreds of millions of dollars in damages.

"[T]his Court has stated from its first Due Process cases . . . [that] traditional practice provides a touchstone for constitutional analysis," *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2339 (1994), and has recognized that a party may not be deprived of property through the imposition of liability in a case "without the safeguards of common law procedure," *id.* at 2340. The Court has regarded certain "basic" and "well-established" "procedural protections of

the common law" to be "so fundamental" that the failure to provide those protections in an adjudication constitutes a violation of the Due Process Clause. *Id.*

One of the traditional procedural guarantees of the common law has been that a legislature may not reverse or reopen a court's final judgment adjudicating private rights. Indeed, this Court explained in *Hurtado* v. *California*, 110 U.S. at 536 (cited with approval in *Honda*), "due process of law" excludes from legislative power "acts reversing judgments, . . . legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation." *See also Bagg's Appeal*, 43 Pa. 512, 515 (1862) ("A man's rights are not decided by due course of law, if the judgment of the courts upon them may be set aside or opened for further litigation by an Act of Assembly.").[10] Thus, although, some colonial and state legislatures did enact measures that interfered with the finality of court judgments, by the time

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[10] Nineteenth-Century state-court decisions consistently held that legislatures could not deprive litigants of final judicial judgments. *See, e.g., Denny* v. *Mattoon*, 84 Mass. (2 Allen) 361, 379 (1861) ("[A]n act of the legislature cannot set aside or annul final judgments or decrees. This is the highest exercise of judicial authority."); *Lewis* v. *Webb*, 3 Me. 326, 332 (1825); ("And can the legislature, by a mere resolve, set aside a judgment or decree of a Judicial Court, and render it null and void? This is an exercise of power common in Courts of law; a power not questioned; but it is one purely judicial in nature."); *Young* v. *State Bank*, 4 Ind. 301, 303 (1853) ("The legislature does not possess the power to grant a new trial in a suit at law. . . . The granting of a new trial is a judicial act, and, in this state, controlled by settled rules of law. . . . And it is a power that should not be possessed by the legislature, in its legislative capacity. . . ."); *Bates* v. *Kimball*, 2 D. Chip. 77, 90 (Vt. 1824) (holding that statute which reopened a final judgment was unconstitutional as it "is an assumption of Judicial power"); *De Chastellux* v. *Fairchild*, 15 Pa. 18, 20 (1850) (striking down statute that directed the reopening of a final judgment and stating that "[i]f anything is self-evident in the structure of our government, it is, that the legislature has no power to order a new trial, or to direct the court to order it").

of the adoption of the Constitution and the Bill of Rights, American practice banned legislatures from such intrusion into the judicial process. *See supra* pages 18-20; R. Berger, *Congress v. The Supreme Court* 182 (1969) ("True, some of the early legislators reversed ordinary judicial decisions, but such practices were vigorously condemned by Jefferson in 1782, and by the Pennsylvania Council of Censors in 1783, as part of a 'constitutional reaction,' which in Corwin's words, 'leaped suddenly to its climax in the Philadelphia Convention.'") (quoting E. Corwin, *The Doctrine of Judicial Review: Its Legal and Historical Basis, And Other Essays* 37 (1963)). As Justice Iredell stated in *Calder* v. *Bull*, it "appear[ed] strange" to him that the legislature should reverse the final judgment of a court. 3 U.S. (3 Dall.) at 398.

Thus, throughout the Eighteenth and Nineteenth Centuries this Court repeatedly declared that legislatures could not take away final judgments from private litigants, *see supra* pages 22-27, and in 1898, after the Fourteenth Amendment had made the federal due process requirements applicable to the States, this Court in *McCullough* v. *Virginia*, 172 U.S. 102 (1898), held that the reversal of a state court judgment on the basis of subsequently enacted legislation violated the Constitution:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

172 U.S. at 123-24.

The United States urges the Court to reject *McCullough* as inconsistent with other decisions of this Court because the judgment at issue in that case "was pending on appeal when the state legislature changed the relevant law." U.S. Br. at 41. It is correct that this Court has held in certain

contexts that a judgment is not "final" for constitutional purposes until all appellate review has been exhausted or, if no appellate review is sought, the time for appeal has expired. *See, e.g., Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987). The Court's present understanding of finality, however, does not conflict with the underlying legal principle stated in *McCullough* that a court judgment adjudicating private rights under a claim for monetary damages, once it is determined to be final under the Constitution, may not be overturned by the Legislative Branch. Indeed, with the exception of a handful of courts upholding § 27A(b), the universal conclusion of the lower courts has been that *McCullough* remains good law and precludes a legislature from overturning "[a] judgment that has become final through exhaustion of all appellate remedies." *Central States, Southeast & Southwest Areas Pension Fund* v. *Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1345 (7th Cir.), *cert. denied*, 490 U.S. 1090 (1989).

This Court has consistently recognized this constitutional principle. *See, e.g., Stephens* v. *Cherokee Nation*, 174 U.S. 445, 478 (1899) (upholding Congress' power to regulate the final judgments of legislative courts, but reiterating that "it is undoubtedly true that legislatures cannot set aside the judgments of [Article III] courts"); *accord Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338, 340 (1922); *Hodges*, 261 U.S. at 603; *Chicago & Southern Air Lines*, 333 U.S. at 113; *cf. Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 310 (1945) (suggesting a due process problem may arise if a new statute of limitations "deprive[s]" a defendant "of a final judgment in its favor").

The United States argues that affording due process protection to final judgments is a "constitutional anachronism." U.S. Br. at 47. It relies on decisions of this Court that, it says, hold that "[i]n the realm of social and economic legislation, due process demands only that the legislature pursue a legitimate public purpose and that the impact on private property interests be rationally related

to the public ends of the law." *Id.* at 33. Yet, in none of the "social and economic legislation" cases cited by the Government was the property interest at issue embodied in a final judgment culminating a judicial process.

Moreover, the cases the United States cites that do involve legislation affecting judicial judgments are distinguishable from the case at bar. In *Fleming* v. *Rhodes*, 331 U.S. 100 (1947), for example, the statute upheld by this Court did not reverse a judgment involving a claim for monetary damages, but rather set aside a decree for prospective relief. As noted earlier, this Court has long recognized that altering the rights of parties in the future is quasi-legislative in nature and thus is understandably more subject to legislative modification. *See also Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 91 & n.6 (1958) (interpreting *Fleming* to uphold a statute that "applies prospectively only"). Nor did *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940), involve an attempt by Congress to intervene and reopen a dispute after the controversy had already been conclusively resolved by the judicial process. *See id.* at 381 & n.25. In *Freeland* v. *Williams*, 131 U.S. 405 (1889), which predates *McCullough*, this Court upheld the traditional power of a *court*, in the exercise of its equitable discretion, to enjoin execution of a final judgment "if it is against right, justice and law," but it did not hold that the legislature may, consistent with due process of law, *require* courts to reopen final judgments. *Id.* at 420.

The power to reopen final judgments has for good reason always been confined to the courts. As this Court acknowledged in *Landgraf*, there are serious risks inherent in permitting Congress to decide, on a retroactive basis, the private rights and liabilities of specific individuals: "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a

means of retribution against unpopular groups or individuals." 114 S. Ct. at 1497.

These dangers are present, at least to some extent, whenever Congress passes any retroactive legislation, but they are intolerable where, as here, Congress acts to overturn the final judgments of courts. The "very object for which civil courts have been established . . . is to secure the peace and repose of society by the settlement of matters capable of judicial determination." *Southern Pacific R.R. Co.*, 168 U.S. 1, 48-49 (1897); *see also Federated Department Stores*, 452 U.S. at 401. Therefore, legislation that overturns final judgments, by definition, will "sweep away settled expectations suddenly." *Landgraf*, 114 S. Ct. at 1497.

The Judiciary was conceived by the Framers as an important check on legislative power, and thus a guarantee of the rights of private citizens. *See* E. Corwin, *Progress*, at 517 (explaining that the "structural and functional shortcomings of the early state constitutions played directly into the hands of both popular and doctrinal tendencies which distinctly menaced what, Madison called, 'the security of private rights'"). That check is worthless, however, if it may be overturned at will by the Legislative Branch in particular dismissed cases, effecting popular will as against private rights. As Hamilton observed, "[t]here is an absurdity in referring the determination of causes in the first instance to judges of permanent standing, and in the last to those of temporary and mutable constitution . . . . The habit of being continually marshalled on opposite sides, will be too apt to stifle the voice of both law and equity." *The Federalist* No. 81, at 544.

Allowing the Legislative Branch to step in at the conclusion of the judicial process and strip litigants of a final judgment is inherently unfair and inconsistent with traditional principles of due process. This Court has recognized that "[a] fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S.

133, 136 (1955), and has therefore consistently held that a neutral and detached decisionmaker is required by due process, *see, e.g., Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986); *Tumey* v. *Ohio*, 273 U.S. 510 (1927). Permitting a legislature to overturn the final judgment of a court undermines this principle by subjecting the impartial and politically neutral decisionmaking of a judge to a majoritarian veto by an elected, political body. Furthermore, legislative revision of final judgments defeats the due process principle requiring notice and an opportunity to be heard before deprivation of a property right. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The last-minute, late-night horse trading that produced § 27A(b) is inherently inadequate to provide sufficient procedural safeguards for private litigants who have achieved a final victory in an adjudication. *Cf. Chadha*, 462 U.S. at 962 (Powell, J., concurring in the judgment) (noting "the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power").

Thus, even if Congress were constitutionally authorized to exercise what has, to date, been understood to be the exclusive power of the courts under certain narrow circumstances to reopen final judgments, it would, as a matter of due process, be required to establish procedures and rules that substitute for the protections afforded by the adversarial process of the courts. *See Honda*, 114 S. Ct. at 2340-41; *id.* at 2342-43 (Scalia, J., concurring). Congress invoked no such procedures here, and its effort to take away respondents' judgment violates due process.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below.

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APPENDIX

Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (Supp. IV 1992):

> **(a) Effect on pending causes of action**
>
> The limitation period for any private civil action implied under section 78j(b) of this title [§ 10(b) of the 1934 Act] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> **(b) Effect on dismissed causes of action**
>
> Any private civil action implied under section 78j(b) of this title [§ 10(b) of the 1934 Act] that was commenced on or before June 19, 1991 –
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the [date of enactment of this section] December 19, 1991.

Article I, Constitution of the United States:

> **Section 1.** All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
>
> . . . .

Article III, Constitution of the United States:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . .
>
> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States; . . . between a State and Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, ...
>
> . . . .

Fifth Amendment, Constitution of the United States:

> No person shall. . . . be deprived of life, liberty, or property, without due process of law; . . . .

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988):

> **§ 78j. Manipulative and deceptive devices**
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contri-

> vance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities & Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1994):

> **§ 240.10b-5 Employment of manipulative and deceptive devices.**
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.